verdicts that have been rendered by English juries in celebrated cases. It said: "The record verdict of £50,000 damages for libel obtained by Mr. Lever, M. P., against the Daily Mail recalls some verdicts for enormous sums obtained in the British Isles. In July, 1804, Curran appeared at the Ennis Assizes in the celebrated crim. con. case of Mr. Massey, a clergyman, against the Marquis of Headfort, and obtained the huge sum, as the value of money in those days rendered it, of £10,000 damages. In Feb., 1807, Valentine Lord Cloncurry, a noted figure in Irish public life for more than fifty years, was divorced from his wife by Act of Parliament owing to her mis conduct with Sir John Piers, from whom he recovered £20,000 damages. In 1893 Mr. Gatty obtained against the late Colonel Farquharson, M. P., damages for £5,000 in an action for libel and slander during the general election of 1892 in a contest in which Colonel Farquharson and Mr. Gatty were opponents. A feature of this trial was the examination on behalf of Mr. Gatty, as witnesses, of Mr. George Wyndham and Mr. St. John Brodrick (now Lord Midleton), who although opposed in politics to Mr. Gatty, bore testimony to his high character. In the Belt libel suit, which lasted forty-three days in the eighties of the last century, there was a verdict for the plaintiff of £5,000 damages. In the Constantinidi divorce case there were damages for £25,000; and the Times, after the Pigott exposure in 1889, published an abject apology for the 'fac-simile letter,' and stayed Mr. Parnell's action for libel by the payment of £5,000, which he accepted. So recently as 1896 the verdict obtained by Mrs. Kitson against Dr. Playfair for libel and slander for £12,000 created astonishment on account of the great amount of the damages."

See note appended to Burdick *v.* Missouri Pacific R. Co., 26 L. R. A. 384.

KLINE *v.* MILLER, ADM'R *et al.*

Nov. 21, 1907.

[59 S. E. 386.]

Vendor and Purchaser—Vendor's Lien—Satisfaction—Merger.—K. purchased an undivided moiety in the M. and B. tracts of land, executing five bonds for the unpaid price secured by a vendor's lien. Later K. purchased the other half of the tracts, defendant's intestate becoming surety for the unpaid portion of the price, which was also secured by a vendor's lien. K. conveyed this moiety to intestate, in trust to secure the price, and, being unable to pay for the M. tract, conveyed all the land to intestate for part cash and the residue in five annual installments secured by a vendor's lien on the land. Intestate then held the incumbrances on the B. tract, and, while his purchase money bonds for the M. tract were in excess of those liens, the bonds were not due. Thereafter intestate paid off for K. a bond for $910, and, after his death in a settlement, this amount was applied in payment of the deferred installments of purchase money on the M. tract, leaving undischarged the vendor's liens on the B. tract to the extent of the balance due from K. to intestate's estate. Held,

that the conveyance by K. to intestate of the M. tract did not by its own force extinguish the incumbrances he held on the B. tract, because his liability on the purchase of the M. tract was in excess thereof; the rule that, when the holder of an incumbrance acquires the property on which it rests, the lien is extinguished, being inapplicable.

Appeal from Circuit Court, Rockingham County.

Action by Daniel Miller's administrator and others against John B. Kline. From a judgment in favor of complainants, defendant appeals. Affirmed.

George G. Grattan and *John E. Roller,* for appellant.
Sipe & Harris, for appellees

WHITTLE, J. We shall confine our inquiry to the bearing of the decree complained of on the rights of John B. Kline, who is the sole appellant.

The facts revelant to the matter in controversy are as follows: On September 1, 1873, D. B. Kline purchased of C. R. Branner an undivided moiety of two tracts of land, situated in Rockingham county, Va., one known as the "Meadow" tract, containing 103 acres, and the other the "Brush" tract, of 107 acres. The purchase price of Branner's interest in the properties was $3,650, of which sum $1,650 was paid cash, and for the credit installments the purchaser executed five bonds for $400 each, payable at one, two, three, four and five years, secured by a vendor's lien reserved in the deed. One year later Kline bought of Eliza A. Homan the other half of the two tracts for $3,919.45, on the same terms as to cash and credit payments, with his father-in-law, Daniel Miller, as surety, and a vendor's lien also reserved on the face of the deed. Kline conveyed this moiety of both tracts in trust to secure the amount of the purchase price to Miller; and, being unable to pay for the Meadow tract, on May 10, 1875, he sold and conveyed the entire tract to Miller for $5,961.67; the terms of sale being $3,000 cash and the residue in five annual installments of $592.23 each, secured by vendor's lien on the land.

At that time this was the status of affairs between the parties: Miller was the holder of the encumbrances on the Brush tract, while his purchase money bonds for the Meadow tract were in excess of those liens. It will be observed, however, that these bonds were not then due.

On June 21, 1875, Miller paid off for Kline what is known in the record as the "Sites bond" of $910, and died July 5, 1877, without change in the status quo between him and Kline. His son, J. P. Miller, qualified as his administrator, and on January 1, 1878, entered into a written agreement with Kline (to which all the Miller heirs were parties) settling the transactions between

him and the estate. In that settlement the amount of the Sites bond was applied in payment of the deferred installments of purchase money of the Meadow tract, the effect of which appropriation was to leave undischarged the vendor's liens on the Brush tract, to the extent of the balance ascertained to be due from Kline to Miller's estate. This settlement and application of payments was subsequently ratified and confirmed, and the balance due established as "a lien on the Brush tract," (at Kline's instance) by decree of the circuit court of Rockingham county of June 17, 1881, in a suit in equity brought by Kline to administer Daniel Miller's estate. It will, moreover, be observed that all persons then in interest were parties to the agreement, settlement, and suit, and that, at that time, no question was raised as to the fairness and propriety of the proceedings and result attained.

The appellant's interest in the subject-matter in controversy accrued March 1, 1887, when his brother, D. B. Kline, executed a deed of trust for his benefit on 71½ acres of the Brush tract, followed by an absolute conveyance of that property on September 31, 1889.

In 1896 this suit was brought by Miller's administrator against Kline and his alienees, to subject the Brush tract to the satisfaction of the amount due on the vendor's liens. The decree appealed from confirmed the finding of the master in chancery, to whom the question was referred, that the indebtedness from Kline to Miller's estate constituted a subsisting lien on the Brush tract.

The major premise of the appellant presents the narrow question, that the dealings between Kline and Miller, which culminated in the deed of May 10, 1875, conveying the Meadow tract from the former to the latter, operated *ipso jure* an extinguishment of the incumbrances on the Brush tract. The contention proceeds on the theory that, Miller being the holder of those liens, and his liability on the purchase of the Meadow tract representing an indebtedness to Kline in excess of the liens, they were, by operation of law, irrespective of the intention of the parties, *eo instanti* discharged. The principle invoked to sustain that proposition is that, when the holder of an incumbrance subsequently acquires the property upon which it rests, the lien is thereby extinguished.

The doctrine is illustrated by the case of Allen *v.* Patrick, 97 Va. 521, 34 S. E. 451, where a husband, having purchased his wife's contingent right of dower in his real estate, secured the purchase price, along with other debts, by a deed of trust on the land. On the death of the wife intestate, the husband took the debt as her distributee, and the court held that the debt and lien to secure it were extinguished.

The distinction between that case and this is obvious. Here

the owner of the incumbrance was not the owner of the estate, and hence there was no such blending of interests as would occasion the merger of the lesser in the greater. Moreover, there is no evidence in the record of any stipulation between the parties, at the date of the sale of the Meadow tract, that the purchase money should be applied in discharge of incumbrances on the other tract; but a contrary intention is plainly to be inferred from the circumstance, that the sale, as we have remarked, was not for cash, and the fund which it is said was applied by operation of law in liquidation of the liens was not available for that purpose, because, by express agreement, it was payable at one, two, three, four, and five years from that date. The bare statement of the proposition would seem to proclaim its fallacy.

In Allen *v.* Patrick, *supra*, the court also held: "If a court of equity finds it to be to the interest of a mortgagor who has acquired the mortgage that a merger should not occur, it will keep both alive, but the interest must be one the promotion of which commends itself to a court of conscience. It must be for an innocent purpose, and in order to work a substantial justice." See, also, Rorer *v.* Ferguson, 96 Va. 411, 31 S. E. 817.

In this case, at the date of the application of what was due from Miller's estate on the purchase price of the Meadow tract in payment of the Sites bond, the appellant was a stranger to the transaction, and his rights in no manner affected by it. It was competent, therefore, for Kline to make the application that was made, and in appropriating the payment to the least secured debt he only did what the law would have done in the absence of action by the parties. Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

In Coles *v.* Withers, 33 Grat. 186, the court (page 203) observes: "The general rule is subject to but few exceptions, and this is not one of them: That the court cannot go outside of the case, or see how third persons may be affected by the application. In Gordon *v.* Hobart, 2 Story, 243, Fed. Cas. No. 5,608, Judge Story said that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor had required it."

We are of opinion that, both on principle and authority, the decree in this aspect of the case is plainly right.

Subordinate assignments of error were not pressed, and, being without merit, need not be noticed.

For these reasons, the decree must be affirmed.

Affirmed.

Note.

Merger of Estates.—Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and

a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged—that is, sunk or drowned in the greater. To this result, it is necessary (1) that the two estates should be in one and the same person, (2) at one and the same time, (3) in one and the same right. 2 Bouv. Institutes, 375, No. 1989; 2 Minor's Inst. (2d Ed.), 368, et seq; Garland *v.* Pamplin, 32 Gratt. 305, 315; Little *v.* Bowen, 76 Va. 724.

It is with the first of these conditions that the principal case deals, namely: In order for a merger of estates to take place, it is necessary that the greater and lesser estates should unite in one and the same person. Garland *v.* Pamplin, 32 Gratt. 315; Allen *v.* Patrick, 97 Va. 521; Reed *v.* Latson, 15 Barbour's Chancery (N. Y.) 9; Aiken *v.* Milwaukee, etc., R. Co., 37 Wisconsin 469.

And it was on this ground that it was held, in the principal case, that no merger took place, because as the court said: "Here the owner of the incumbrance was not the owner of the estate, and hence there was no such blending of interests as would occasion the merger of the lesser in the greater."

A husband, tenant by the curtesy initiate in his wife's lands, conveys his interest in such lands to trustees for the use of his wife. The wife now has a reversion in fee and the equitable interest in the life estate. But no merger occurs; for the legal title to the life estate is in the trustees, while the reversion is in the wife, and so they have never united in one person. An equitable estate is merged or extinguished in the legal estate only when the characters of trustee and cestui que trust are united in the same person. Garland *v.* Pamplin, 32 Gratt. (Va.) 315.

The unity of husband and wife is not, under modern doctrines as to a married woman's equitable or statutory separate estate, such that a conveyance of an equity of redemption to one and the mortgage to the other creates a merger. Cooper *v.* Whitney, 3 Hill (N. Y.) 95.

The owner of a note and the deed of trust by which it is secured has no estate in the land, and his subsequent acquirement of the fee through a sheriff's deed, does not merge the estates, "for there was no union of estates in one and the same person, while the estate conveyed by the deed of trust remained outstanding in the trustee. The State to use *v.* Koch, 47 Mo. 582." Hospes *v.* Almstedt, 13 Mo. App. 270, 274.

In a case where the legal title, the larger estate, was vested in a trustee, and the equity of redemption, the less estate, in another, the two estates never united in him (the latter), and there could not be otherwise a merger of title. Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768.

A learned article upon the "Merger of Estates" will be found in 5 Va. Law Register, p. 651.

See note to Foster *v.* Smith, 5 L. R. A. 721.

Application of Payments.—It has been settled in Virginia by repeated decisions that where neither the debtor nor the creditor has exercised the right to make an application of payments, and the duty devolves on the court, if there is no other fact or circumstance upon which the court can lay hold to guide and direct its discretion, the payment will be appropriated to that debt which is least secured or most precarious. See Smith *v.* Loyd, 11 Leigh 512, 37 Am. Dec. 721; Vance *v.* Monroe, 4 Gratt. 53; Coles *v.* Withers, 33 Gratt. 186; Magarity *v.* Shipman, 82 Va. 784; Pope *v.* Transparent Ice Co., 91 Va. 79.

See note to Blake *v.* Sawyer, 12 L. R. A. 712.